December 21, 1999

OFFICE OF THE HEARING EXAMINER
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DECISION ON REQUEST FOR CLARIFICATION

SUBJECT: Department of Development and Environmental Services File No. **E9701293B**

HAROLD CHRISTIANSON
Code Enforcement Appeal

Location: 1700 – 264th Northeast, Redmond, Washington

Appellants: Harold and Carol Christianson**,** *represented by* **Craig D. Magnusson,**
5400 Carillon Point
Kirkland, WA 98033
Telephone: (425)576-4070 Facsimile: (425)576-4040

Intervenor: **William Harper,**
16541 Redmond Way PMB #140
Redmond, WA 98052-4482
Telephone: (425)868-8028

King County: Department: Development and Environmental Services, *represented by* **Manuela Winter** and **Lamar Reed**
900 Oakesdale Avenue Southwest
Renton, WA 98053
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A. APPELLANT'S PROCEDURAL OBJECTION OVERRULED.

The Appellant objects to this reconsideration, arguing that the Department's "…e-mailed 'request for clarification' by its own terms does not comply with applicable rules for reconsideration, but instead constitutes an impermissible *ex parte* communication with a Hearing Officer acting in a quasi-judicial role with matters under appeal remaining unresolved."

The Examiner's Rules at Section XI.G. provides for reconsideration requests and establishes "the period for filing a notice of appeal or petition for review" as the period during which such

requests shall be deemed timely. This request was filed on the twenty-first day of a twenty-one day appeal period and is therefore timely. It is regrettable that the Department did not serve its request concurrently upon the parties. However, the Examiner's Rules do no explicitly require service on post-hearing requests. Moreover, the Examiner cured any possible problem regarding *ex parte* contact by providing copies of the Department's request to the parties and by providing the parties opportunity to respond. The objection is DENIED.

B. DEPARTMENT'S REQUEST FOR RECONSIDERATION REVIEWED; FINDINGS.

The Department of Development and Environmental Services ("Department") requests clarification, or reconsideration, of the Examiner's November 1, 1999, report and decision with respect to four issues or areas of concern. Three of those concerns were rejected by the Examiner's November 23, 1999, "Decision on Request for Clarification; Reconsideration Order Containing Filing Deadline." The fourth issue was stated by the Department as follows:

> "…Mr. Christianson testified that he removed approximately ten cubic yards of gravel from the 2-S stream on his property… Is your order saying that use is grand-fathered?"

Having received the Department's request on November 22, 1999, the Examiner on the next day made available to the other parties (Appellant Christianson and Intervenor Harper) the full text of the Department's request, establishing a response deadline of December 16, 1999. Based on the arguments of the parties the following review is entered:

1. The Appellant argues that he did not testify to removing <u>any</u> gravel from the stream bed or from within the water course (bank-to-bank) at any time. Moreover, the Appellant argues, he did not testify to using "10 yards of gravel." Instead, he argues, he testified to moving "ten buckets"; an amount that, he suggests, should be regarded as *de minimus*. (A "bucket" in this case, according to the Appellant, refers to the approximate two cubic-foot capacity of a small garden excavator.) This relatively small movement of gravel, the Appellant argues, removed a small portion of flood deposition from a garden/pond area that was cleared and established sixty years ago.

2. The record shows that Mr. Christianson abandoned active gardening of the area since 1989, but has continued to keep the area cleared.

3. The record of testimony supports Mr. Christianson's assertion that he did not remove gravel from the stream bed. The record of testimony does <u>not</u> directly support his assertion that only ten <u>buckets</u>, rather than ten yards were transferred. His actual testimony referred to moving, "… less than ten yards." The gravel material was moved from the pond area located adjacent to both the stream and garden areas. Whatever the amount of gravel removed from the pond area (and placed on the driveway), it certainly was an amount insufficient to make any noticeable indentation upon the land. The pond area of concern is located within the 100-foot-wide protective buffer area established by KCC 21A.24.

4. The record suggests that the permit fees, review fees, consultant fees and implementation costs could be several thousand dollars to remedy the violation.

CONCLUSIONS:

1. Decisions on Code Enforcement appeals must be consistent with constitutional case law concerning regulatory takings and substantive due process under development by the United States and Washington Supreme Courts. See, e.g., Dolan v. City of Tigard, 129 L. Ed. 2d. 304 (1994), and Guimont v. Clarke, 121 Wn. 2d. 586 (1993), and cases cited therein. These cases require that when government regulation infringes via an adjudicatory proceeding upon a real property right, government shall have the burden to demonstrate that a direct relationship exists between the burden imposed and a legitimate public interest, and that *the burden is generally proportional to the harm being remedied*. These cases further mandate that such regulatory schemes employ means which are reasonably necessary to achieve their legitimate purposes and *are not unduly oppressive upon the property owner*.

2. The imposition of a few thousand dollars of grading permit fees, review fees and restoration costs exceeds the bounds of proportionality required by constitutional case law and would be unduly oppressive upon the property owner given the extent and consequence of the gravel transfer at issue. The disproportionality of the Department's enforcement measures in this case constitutes "substantial injustice." KCC 23.02.04.H grants authority to waive such provisions as appropriate to avoid substantial injustice.

3. The decision below does not "grand-father" or authorize gravel extraction from stream beds. No such activity occurred. No such activity is authorizable through this review.

4. The decision below does not "grand-father" or authorize gravel removal from an established stream protective buffer. Such activity did occur. For the reasons indicated in Conclusions 1. and 2., above, the enforcement provisions are waived with respect to this first citation.

5. The decision below certainly recognizes the legal nonconforming status of the driveway.

6. Due to inactivity within the garden area, Appellant Christianson lost any agricultural exemption (from sensitive areas regulation) that might have applied pursuant to KCC 21A.24.050 (which requires agricultural activities to have been performed at least once during the past five years). However, KCC 16.82.050.17.a nonetheless provides exemption from grading permit requirements within sensitive areas for, "Normal and routine maintenance of existing lawns and landscaping." The undisputed continued periodic clearing of the garden area established sixty years ago certainly qualifies for this exemption.

   The cited streambank/pond area gravel removal does not similarly qualify for grading permit exemption because Mr. Christianson testified that the gravel was removed from a flood deposition within a (no longer agriculturally exempt) *pond* area (not the garden area). Future gravel deposits on the driveway will have to come from somewhere else --such as a commercial source. See Conclusion 4, above. Repeated or renewed violation may be expected to cause full

enforcement.

7. The Appellant could be ordered to put a few wheelbarrow loads of gravel back where he found it but the record contains no showing of any public benefit that would result.

DECISION.

1. The Department's request for reconsideration and/or clarification regarding "Activities at Issue No. 5.E" is answered by the Conclusions above.

2. No change in the Order contained on pages 7 and 8 of the Examiner's November 1, 1999 report and decision is necessary or required for the reasons indicated in Conclusions 1 and 2, above.

3. The Conclusions above are intended to provide clarification to Conclusion No. 3 on page 6 of the Examiner's November 1, 1999 report and decision.

4. Finding 5.e on page 5 of the Examiner's November 1, 1999 report and decision is amended to read, "***Removal*** of gravel deposits along the north bank of the stream of concern within an area identified in the hearing record as 'Area E.' "

ORDERED this 21st day of December, 1999.

_____

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 21st day of December, 1999, to the following parties and interested persons:

W.T. Albro
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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)